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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Cross-Petitioner,

—v.—

LEE F. HIGMAN, *et al.*, GERRY W. MONROE, *et al.*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and UNITED AIR LINES, INC.,

Respondents.

CROSS-PETITION OF AIR LINE PILOTS ASSOCIATION, INTERNATIONAL FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court below construed the bona fide occupational qualification provision of §4(f)(1) of the Age Discrimination in Employment Act ("ADEA") contrary to the terms of the statute and the decisions of other courts of appeals, and thereby erroneously affirmed the district court's denial of defendants' motion for judgment notwithstanding the verdict?

2. Whether the court below construed §4(f)(2) of the ADEA contrary to the terms of the statute, and the decisions of this Court construing parallel provisions of §703(h) of the Civil Rights Act of 1964, in holding that a bona fide seniority system which does not allow younger pilots any greater freedom in downgrading than older

pilots may be unlawful if it has a disparate impact on older pilots?

3. Whether the court below erred in construing §4(f)(2) of the ADEA and the 1978 ADEA amendments to require the modification of a seniority system negotiated prior to the enactment of the ADEA to grant additional transfer rights to pilots disqualified by the Federal Aviation Administration Age 60 Rule?

PARTIES

Plaintiffs are Captains, First Officers, and Second Officers employed by United Air Lines, Inc. ("United") prior to age 60; the 115 individual plaintiffs are listed at B-1 to B-3 in the Appendix to the Petition for Certiorari ("Petition") in United Air Lines,

Inc. v. Higman, No. 84-774. The Equal Employment Opportunity Commission ("EEOC") intervened as a plaintiff in the District Court. United, the sole defendant, impleaded Air Line Pilots Association, International ("ALPA"), which has been aligned with United in presenting United's case in the courts below.

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CROSS-PETITION OF AIR LINE PILOTS ASSOCIATION, INTERNATIONAL FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINION BELOW

The opinion of the Court of Appeals is officially reported at 736 F.2d 394 and

appears at A-1 in the Appendix to the petition in United Air Lines, Inc. v. Higman, No. 84-774.

JURISDICTION

The opinion of the Court of Appeals issued on May 30, 1984. The Court denied plaintiffs' petition for rehearing and suggestion for rehearing in banc on August 10, 1984. United's petition in United v. Higman, No. 84-774, was filed within 90 days of that denial of rehearing. Pursuant to Rule 19.5 of this Court, this cross-petition is filed within 30 days of receipt of United's petition on November 13, 1984.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The jurisdiction of the district court was

based on 28 U.S.C. §1331 and 29 U.S.C. §626(c).

STATUTES AND REGULATIONS INVOLVED

Sections 4(f)(1) and (2) of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §623(f)(1) and (2), provide:

> "It shall not be unlawful for an employer, employment agency or labor organization --
>
> (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;
>
> (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this

> chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual[.]"

Section 121.383(c) of the Federal Aviation Regulations, 14 C.F.R. §121.383(c) (the Federal Aviation Administration "Age 60 Rule"), provides:

> "No certificate holder may use the services of any person as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday. No person may serve as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday."

STATEMENT OF THE CASE

United employs flight deck crew members in Captain, First Officer and Second

Officer status. ALPA is the bargaining representative for all United flight deck crew members. Collective bargaining agreements ("agreements") between United and ALPA govern the terms and conditions of pilot employment.

1. United's Age 60 Policy

The Federal Aviation Administration ("FAA") does not permit service as a Captain or First Officer in commercial operations after age 60. 14 C.F.R. §121.383(c). On aircraft certificated by the FAA to be operated by a three person flight deck crew, a United Second Officer serves as a qualified flight engineer, as required by 14 C.F.R. §121.387, and performs additional duties assigned by United. The FAA has not established any age limita-

tion for the flight engineer position,[1] and has determined that the position of Second Officer on United is not subject to the FAA Age 60 Rule.

For more than 30 years, United has required all flight deck crew members to retire at age 60 for asserted safety reasons. Tr. 3535-3537; 3547-3549. United continued to apply its age 60 policy to all flight deck crew members after the FAA adopted an age 60 limit for Captains and First Officers in 1959. While Congress generally prohibited the use of age limitations in enacting the ADEA in 1967, §4(f)(2) of the ADEA exempted mandatory retirement provisions embodied in a bona

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[1] See 49 Fed. Reg. 14692 (April 12, 1984).

fide employee benefit plan. The United pilot pension plan applicable to all flight deck crew positions lawfully provided for mandatory retirement at age 60. See United Air Lines, Inc. v. McMann, 434 U.S. 192 (1977).

With the enactment of the 1978 ADEA amendments, Pub. L. No. 95-256, 92 Stat. 189 (1978), which eliminated a §4(f)(2) defense for mandatory retirement because of age, United was required to determine whether its age 60 policy could be maintained as a "bona fide occupational qualification" under §4(f)(1) of the ADEA, 29 U.S.C. §623(f)(1). In 1978, after a review of the age 60 policy by the medical and flight operations departments, United's Chief Executive Officer determined to main-

tain this policy "for reasons of safety." Tr. 5872.

The medical basis for United's age 60 rule, as presented through the testimony of its executives, medical directors, and expert witnesses, is that the incidence of certain types of incapacitating events (heart attacks, strokes, etc.) increases after age 60, and that existing medical procedures cannot accurately predict these incapacitating events on an individualized basis. The annual medical examinations conducted by United's medical department (which are in addition to, and more extensive than, the exams required by the FAA) have often failed to predict or detect medical conditions that result in groundings: while United grounded 209

flight officers for medical reasons between 1976 and 1981, only 53 were detected in the annual examinations; in the other 156 cases, the medical condition developed between examinations. (Dx. 102A; J.A. 60). The FAA articulated a similar rationale for an age 60 limitation for pilots in 1959,[2] and reaffirmed that medical basis for its age 60 rule in 1984, 49 Fed. Reg. 14692,

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[2]In 1959, the FAA determined "that 'sudden incapacity due to ... medical defects becomes significantly more frequent in any group reaching age 60' and the possibility of sudden incapacity 'due primarily to heart attacks and strokes, cannot be predicted accurately as to any specific individual on the basis of presently available scientific tests and criteria.'" Rombough v. FAA, 594 F.2d 893, 897 (2d Cir. 1979) [quoting] 24 Fed. Reg. 9767 (December 5, 1959). The FAA has refused to consider requests for individual exemptions from the Age 60 Rule based on its determination that medical testing remains inadequate to make individualized assessments concerning the risk of sudden incapacitation after age 60. Id., at 898. See, e.g., Starr v. FAA, 589 F.2d 307 (7th Cir. 1978).

14695 (April 12, 1984).[3]

United also presented undisputed evidence that Second Officer duties are critical to flight safety. (Dx. 89). Two plaintiffs testified concerning situations in which Second Officer observations of oncoming aircraft had averted mid-air collisions (Tr. 6001; 6002-6003); other plaintiffs testified concerning other situations in which the Second Officer

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[3]Congress enacted the Experienced Pilots Act of 1979, Pub. L. No. 96-171, 93 Stat. 1285 (1979), to request the National Institutes of Health to conduct a study of the medical basis for the FAA Age 60 Rule and related questions concerning the effects of aging on pilot performance. The Report of the National Institute of Aging Panel on the Experienced Pilots Study, issued in August, 1981, concluded that (1) changes related to aging adversely affect capacities crucial to pilot performance; and (2) there is no assessment procedure to determine accurately which individuals are less affected by this aging process.

played an essential role in rectifying pilot errors during the descent and landing phases of flight (Tr. 5981-5983; 6005-6006). Plaintiffs agreed that Second Officer errors would have an adverse impact on safety. (Tr. 706, 5977).

2. United's Seniority System

The 1978 ADEA amendments also gave rise to a distinct question concerning the transfer rights of United flight deck crew members. A collectively bargained seniority system governed the allocation of pilot work opportunities on United prior to the enactment of the ADEA, and has continued in effect without modification adverse to plaintiffs (Px. 29, §6(A)(2); Dx. 164). Flight officers may exercise seniority rights to transfer to a higher-paying

position (or the same position at another location) when vacancies are available. In the event of a contraction in operations, seniority may be used to displace an incumbent with lesser seniority. In addition to these predominant uses of seniority to allocate work opportunities in response to changing operational requirements, the seniority system authorizes transfers in two limited situations: temporary loss of the first class medical certification necessary to serve as a Captain or First Officer (§14(G)),[4] and

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[4]Section 14(G) provides that a pilot who can no longer maintain a first clas medical certificate may transfer to another position only if "reasonable medical judgment indicates that he may obtain a first class medical certificate in the future...." There have been six §14(G) transfers. (Tr. 5661-5662). While plaintiffs presented evidence that some such Second Officers had not, in fact, returned to pilot positions, plaintiffs did not offer evidence that, at the time of transfer, there was no basis to

personal "hardship" transfers (§8(P)(2)).[5] Since all flight deck crew positions were lawfully subject to an age 60 limit prior to April, 1978, the seniority system did not include any entitlement for pilots disqualified by the FAA Age 60 Rule to transfer to positions not subject to an age limit.

Following the April, 1978, effective date of the 1978 ADEA amendments, certain United Captains requested transfers to Second Officer positions, but did not claim any personal circumstances justifying a "hardship" transfer other than their

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form a reasonable medical judgment that the pilots could obtain a first class certificate in the future

[5]In the 11-year period between 1970 and 1981, United and ALPA approved 87 of 125 hardship transfer requests; only 20 of those were transfers to lower positions, including 6 proficiency transfers and 2

disqualification by the FAA Age 60 Rule. United denied these requests on the grounds, inter alia, that the seniority system embodied in the pilot agreement did not give a Captain any seniority right to be awarded a Second Officer vacancy, or to displace an incumbent Second Officer in the absence of a contraction in pilot positions or loss of a first class medical certificate.

3. Proceedings in the courts below

Plaintiffs commenced two separate actions in the district court: career Second Officers filed Monroe v. United;

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medical transfers (Px. 251, 252, DX. 95). There is no evidence that any of these transfers resulted in the displacement of incumbent pilots.

Captains and First Officers filed Higman v. United. United specifically denied allegations that Higman plaintiffs retained sufficient seniority to be employed as Second Officers (Ans. ¶10); affirmatively pleaded that contract provisions barred transfers to Second Officer positions (id. ¶42); and counterclaimed for a declaratory judgment that the agreement prohibited such transfers (id. ¶¶90-92).[6] United moved for summary judgment in Higman on the grounds that the age-neutral terms of the agreement barred transfers from Captain to Second Officer positions, but did not invoke the provisions of §4(f)(2) at that time. The district court denied the motion, and identified the asserted discriminatory applica-

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[6]While plaintiffs have claimed that United failed to plead a §4(f)(2) defense, United's answer plainly satisfied the notice pleading requirements of the Federal

tion of the agreement as a material issue of disputed fact. 27 Empl. Prac. Dec. [CCH] ¶32,230 (N.D. Ill. 1980).

In the pre-trial order, plaintiffs asserted discriminatory treatment of transfer requests by age 60 captains as an issue for trial, and defendants raised a bona fide seniority system defense to these contentions. During the trial, the court refused to permit defendants to present a bona fide seniority system defense, or to

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Rules of Civil Procedure. See generally Conley v. Gibson, 355 U.S. 41, 48 (1956); Barnwell & Hays, Inc. v. Sloan, 564 F.2d 254, 255 (8th Cir. 1977). The sufficiency of a pleading is not judged by reference to specific legal theories. See Heyl & Patterson International Inc. v. F.D. Rich Housing of the Virgin Islands, Inc., 663 F.2d 419, 426 (3d Cir. 1981), cert. denied, 455 U.S. 1018 (1982).

amend their answers to assert that defense; at the same time, the Court admitted defendants' evidence material to the seniority system defense on the grounds that these facts were also material to the "reasonable factors other than age" defense. (Tr. 842-870; 2095, 5360). See 736 F.2d at 406.[7] After the jury entered a general verdict in favor of plaintiffs, the court denied a timely motion by ALPA and United for judgment notwithstanding the verdict.

The Court of Appeals reversed the judgment below. The Court held that the jury instructions concerning the BFOQ issue were erroneous and prejudicial, in

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[7]Plaintiffs sought to justify denial of leave to amend the answer on the grounds of unexplained delay and prejudice. Yet the appropriate legal standard requires the party opposing the motion to amend to

that they "denied United a method of establishing its case to which it was entitled," 736 F.2d at 401, and made United's subjective motivation and alleged animus toward older workers a jury issue. The Court further held that the jury in-

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demonstrate undue prejudice: "it must show that it was unfairly disadvantaged or deprived of the opportunity to present facts or evidence which it would have offered had the...amendments been timely." Heyl & Patterson, 663 F.2d at 426. See Howey v. United States, 481 F.2d 1187, 1191 (9th Cir. 1973). On appeal, defendants presented detailed references to the extensive discovery conducted by plaintiffs with respect to the seniority system, and demonstrated the identical factual basis of the "reasonable factor" and seniority system defenses. Plaintiffs have never specified any facts or issues which were not adequately developed in pretrial discovery, or any other particularized prejudice. In these circumstances, the trial court's denial of leave to amend constituted an abuse of discretion. See Beeck v. Aquaslide 'N' Dive Corp., 562 F.2d 537, 540 (8th Cir. 1977).

structions concerning the transfer rights of Higman plaintiffs improperly raised the question whether "United has exhibited bad faith toward older workers." 736 F.2d at 404. Finally, the Court affirmed the denial of judgment notwithstanding the verdict on both the BFOQ and seniority system issues, and remanded for a new trial consistent with its opinion.

REASONS FOR GRANTING THE CROSS-PETITION

The Court of Appeals declined to reverse the denials of judgment notwithstanding the verdict on the basis of erroneous legal standards which are contrary to the terms of the ADEA, the decisions of this Court construing the scope of the bona fide seniority system provisions of Title VII of

the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(h), and to court of appeals decisions construing the "bona fide occupational qualification" ("BFOQ") provisions of the ADEA. Since these issues present important federal questions concerning the impact of the ADEA on the safety of airline operations, and the collectively bargained seniority rights of incumbent employees, ALPA's cross-petition for a writ of certiorari should be granted.

1. BFOQ Issue

The Court below held that United must prove that the incapacitation of a flight engineer "would endanger the flight" in order to establish that its age 60 policy is "reasonably necessary" under §4(f)(1) of the ADEA.[8]

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[8]As ALPA has argued in its brief amicus

> Although we have no doubt that the position of second officer is related to safety, we cannot say that the evidence in this case compels a finding that an incapacitated second officer would endanger the flight.

736 F.2d at 405. This standard is contrary to court of appeals decisions that §4(f)(1) merely requires an employer to prove that its qualifications are related to passenger

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curiae in Western Air Lines, Inc. v. Criswell, cert. granted, ___ U.S. ___, 105 S.Ct. 80 (Oct. 1, 1984) (No. 83-1545), §4(f)(1) should be construed to exempt "a common carrier's age limit if the elimination of the limit would increase the risk of harm to the carrier's passengers. To establish a BFOQ, a carrier should be required to prove that there is a factual basis for its position that: (1) job performance declines after the BFOQ age; (2) inadequate job performance may lead to injuries or deaths; and (3) the risk of injury cannot be substantially eliminated by practical procedures for individual assessments." Br. at 3.

safety,[9] and that elimination of the challenged age limitation would create a significant risk of injury to passenger safety.[10]

The Court below further erred in its assessment of the second element of the BFOQ defense, "United's ability to deal with second officers" over the age of 60 "on an individual basis." 736 F.2d at 405. The court found that differences in medical opinion concerning the incidence and unpre-

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[9]See, e.g., Orzel v. City of Wauwatosa Fire Dept., 697 F.2d 743, 753 (7th Cir.), cert. denied, ___ U.S. ___, 104 S.Ct. 484 (1983) (age qualification "reasonably related to the 'essential operation'" of the business). Accord Mahoney v. Trabucco, 738 F.2d 35 (1st Cir. 1984), cert. denied, ___ U.S. ___, 53 U.S.L.W. 3403 (Nov. 26, 1984).

[10]See Murnane v. American Airlines, Inc., 667 F.2d 98, 101 (D.C. Cir. 1981), cert. denied, 456 U.S. 915 (1982); Burwell v. Eastern Air Lines, Inc., 633 F.2d 361, 371-372 (4th Cir. 1980), cert. denied,

dictability of incapacitating medical events after age 60 created a factual issue for the jury to resolve: on the one hand, United's expert witnesses (Dr. Boshes and Dr. Arbit), the Directors of United's medical department (Dr. Kidera and Dr. Harper), the FAA, and the NIA Report concur that it is not possible to predict incapacitating medical events on an individualized basis; on the other hand, "Dr. Mohler testified that one can predict which persons will suffer heart attacks independent of age through analysis of age-neutral risk factors." 736 F.2d at 405. In meeting a statutory standard whether age is

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450 U.S. 965 (1981); Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 235 (5th Cir. 1976).

"reasonably necessary", it should have been sufficient for United to demonstrate, as it did, that it had a factual basis for its position. For ADEA liability to turn on the relative credibility of conflicting expert opinion concerning fundamental medical facts, such as the predictability of heart attacks,[11] effectively nullifies the congressional decision to permit age limits "where age is a [BFOQ] reasonably necessary to the normal operation of the particular business...." 29 U.S.C. §623(f)(1).

2. Seniority System Issue

The Court below in effect eliminated a bona fide seniority system exemption under

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[11] Compare EEOC v. Missouri State Highway Patrol, ___ F.2d ___, No. 83-1187 (8th Cir. Nov. 12, 1984) (reversing district court finding that age less than 60 is not a BFOQ for Missouri state highway patrol

the ADEA by considering United's seniority rules solely in terms of whether they were "administered ... in a discriminatory manner" or had "a disparate impact on older pilots." 736 F.2d at 407. These considerations may be appropriate in determining

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officers, and criticizing district court's reliance on Dr. Mohler's testimony concerning predictability of heart attacks) and Hoefelman v. Conservation Commission of the Missouri Dept. of Conservation, 718 F.2d 281 (8th Cir. 1983) (in holding that an age less than 60 is a BFOQ for non-commercial pilots, affirmed the district court's determinations crediting defendant's expert's testimony that "it is virtually impossible to determine whether individual pilots over the age of 60 are able to fly safely," and rejecting Dr. Mohler's contrary testimony) with Criswell v. Western Air Lines, Inc., 709 F.2d 544, 551-552 (9th Cir. 1983), cert. granted sub. nom. Western Air Lines, Inc. v. Criswell, No. 83-1545 and Smallwood v. United Air Lines, Inc., 661 F.2d 303, 307-308 n.5 (4th Cir. 1981), cert. denied, 456 U.S. 1007 (1982).

whether United has violated §4(a) of the ADEA,[12] but do not give any effect to the "bona fide seniority system" provisions of §4(f)(2). Whether §4(f)(2) is considered as a defense, or whether it is a "definitional provision ... [which] delineates which employment practices are illegal and thereby prohibited and which are not,"[13] the court's determination concerning judgment notwithstanding the verdict should have been made in terms of the statutory standards for seniority systems, which are to be treated differently under §4(f)(2) from other employment practices.

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[12] But see Geller v. Markham, 451 U.S. 945 (1981) (cert. denied) (Rehnquest J., dissenting) (questioning application of disparate impact theory to the ADEA).

[13] TWA v. Hardison, 432 U.S. 63, 82 (1977), quoting Franks v. Bowman Transportation Co., 424 U.S. 747, 758 (1976) (construing §703(h) of Title VII). Accord American Tobacco Co. v. Patterson, 456 U.S. 63, 69 (1982).

The decisions of this Court construing §703(h) of Title VII clearly establish that the disparate impact of seniority system provisions does not make these provisions unlawful.[14] Rather, §703(h) only prohibits differences which are "the result of an intention to discriminate." 42 U.S.C. §2000e-2(h). As enacted in 1967, §4(f)(2) of the ADEA provided a broader exemption which authorizes an explicitly age-based classification "which is not a subterfuge to evade the purposes of [the ADEA]." Pub. L. No. 90-202, §4(f)(2), 81 Stat. 602, 603 (1967) (current version at 29 U.S.C. §623(f)(2)). In McMann, this Court construed "subterfuge" to apply only to policies adopted subsequent to the enact-

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[14]See, e.g., Fire Fighters Local Union No. 1734 v. Stotts, 104 S.Ct. 2576, 2587 (1984); American Tobacco Co. v. Patterson, 456 U.S. at 65; International Brotherhood

ment of the ADEA, and held that the continued adherence to a pre-Act policy, without modification adverse to the protected class, does not constitute a "subterfuge." 434 U.S. at 203. While the 1978 ADEA amendments made §4(f)(2) inapplicable to both post-Act and pre-Act provisions which "require or permit the involuntary retirement of any individual ... because of the age of such individuals," 29 U.S.C. §623(f)(2), Congress did not modify the term "subterfuge" as construed in McMann.

Thus, §4(f)(2) of the ADEA exempts seniority provisions which have a dis-

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of Teamsters v. United States, 431 U.S. 324, 352-353 (1977).

parate impact on older employees, and even authorizes an otherwise facially discriminatory provision as long as it is not a "subterfuge", and does not require or permit involuntary retirement because of age. It is not age, but rather a pilot's length of service, status and objective circumstances which define his seniority right to obtain a Second Officer position. Even if United had changed its age 60 policy in 1978, Captains and First Officers could not have transferred to the Second Officer position simply because of their disqualification by the FAA Age 60 Rule. The Court below looked for an age-neutral principle to justify the §14(G) loss of medical certification and §8(P)(2) "hardship" exceptions, and denied judgment notwithstanding the verdict in light of

disputed facts bearing on that issue. 736 F.2d at 406-407. However, the relevant question is whether, given the availability of §14(G) and §8(P)(2) transfers, United and ALPA were required to provide an additional transfer right for pilots disqualified by the FAA Age 60 Rule after transfers to the Second Officer position first arguably became available under the 1978 ADEA amendments.[15]

The 1978 ADEA amendments did not require the creation of any additional seniority rights for employees disqualified by a lawful BFOQ. The legislative history of the 1978 ADEA amendments expressly eschews any intent to create such affirmative obligations:

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[15]There is no dispute that the United seniority system is "bona fide", in the sense that it exists and actually operates

This legislation does not require employers to provide special working conditions for older workers to allow them to remain or become employed. While special jobs, part-time employment, retraining and transfers to less physically demanding jobs may be of great

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to allocate work opportunities. Cf. Smart v. Porter Paint Co., 630 F.2d 490, 494 (7th Cir. 1980) (construing "bona fide" in terms of the employee benefit plan provision of §4(f)(2) of the ADEA). United clearly operated "in observance of the terms" of the seniority system, in that the pilot agreement only permitted transfers in certain circumstances, and expressly authorized United not to grant §8(P)(2) requests in its complete discretion. See EEOC v. Shell Oil Co., 637 F.2d 683, 684 (9th Cir. 1981); Smart, 630 F.2d at 494. The pilot agreement expressly makes seniority, which is based on length of service, the basis for allocation of work opportunities. The age-neutral eligibility rules which restrict bidding to higher-paying or the same assignments, and the displacement rules which only allow bumping in certain circumstances, are plainly "ancillary rules that accomplish certain necessary functions, but which may not themselves be directly related to length of employment." California Brewers Association v. Bryant, 444 U.S. 598, 607 (1980).

> benefit to the older employees and the employer alike, these activities are not required by this legislation.

H.R. Rep. No. 527 (Pt. 1), 95th Cong., 1st Sess. 12 (1977). Thus, the Court below plainly erred in its statement that an age-neutral seniority system, which "does not allow younger pilots any greater freedom in downgrading than older pilots," should still be submitted to the jury to "consider whether the seniority system has a disparate impact on older pilots." 736 F.2d at 407. Similarly, the continuing availability of §14(G) loss of medical certification and §8(P)(2) hardship transfer opportunities, which were negotiated at a time when there was no occasion to consider transfer rights for pilots disqualified by the FAA Age 60 Rule, did not require the

creation of an age 60 transfer right in 1978.

This Court has recently decided to review two aspects of airlines' employment practices related to the FAA Age 60 Rule. In TWA v. Thurston, Nos. 83-997, 83-1325, TWA presented the question: "Whether the Age Discrimnation in Employment Act requires an employer to accommodate employees for an age-related reason merely because it provides accommodation for non-age-related reasons?"[16] In Western Air Lines, Inc. v. Criswell, No. 83-1545, this Court granted review on questions involving: (1) the appropriate standards for a BFOQ defense to an age 60 limitation

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[16]ALPA presented the additional question whether §4(f)(1) of the ADEA authorizes the mandatory retirement of pilots who have not successfully transferred to the flight engineer position prior to age 60 and are

for flight engineers; and (2) the allocation of the burden of proof in a "reasonable factor other than age" defense under §4(f)(1) of the ADEA. With respect to this case, the question raised by TWA may clarify the accommodation requirements of the ADEA and the scope of the 1978 ADEA amendments; the questions raised in Western may clarify the appropriate standards for applying §4(f)(1) to an airline's age limitations. Accordingly, at the very least, disposition of the petition and cross-petition in this case should be held in

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thus disqualified by the undisputed BFOQ applicable to airline captains.

abeyance pending a decision in TWA and Western.[17]

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[17]This Court has held in abeyance petitions for certiorari in employment discrimination cases pending the decision in a previously docketed case raising similar issues. Upon decision of the initial case, see e.g., Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981), the subsequently filed petitions for certiorari were granted, and the judgments vacated and remanded to the circuit courts for reconsideration in light of the Court's decision. See Westinghouse Electric Corp. v. Vaughn, 450 U.S. 972 (1981); General Telephone Co. of the Southwest v. Falcon, 450 U.S. 1036 (1981); Uncle Ben's, Inc. v. Johnson, 451 U.S. 902 (1981); Glitsch, Inc. v. Jones, 452 U.S. 912 (1981); U.S. Postal Service v. Aikens, 453 U.S. 902 (1981). Similarly, Local Union No. 84, International Brotherhod of Electrical Workers, AFL-CIO v. United States, 456 U.S. 952 (1982); International Association of Machinists and Aerospace Workers, AFL-CIO v. Terrell, 456 U.S. 955 (1982); and White-Wilson Medical Clinic, Inc. v. Robbins, 456 U.S. 969 (1982), were remanded for reconsideration in light of Pullman-Standard v. Swint, 456 U.S. 273 (1982).

CONCLUSION

For the foregoing reasons, the cross-petition of Air Line Pilots Association, International should be granted, or in the alternative, the disposition of the petition and cross-petition should be held in abeyance pending the decisions of this Court in TWA v. Thurston, Nos. 83-997 and 83-1325, and Western v. Criswell, No. 83-1545.

Dated: December 13, 1984

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Cross-Petitioner,

v.

LEE F. HIGMAN, et al., GERRY W. MONROE, et al., EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and UNITED AIR LINES, INC.,

Respondents.

On Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENTS LEE F. HIGMAN, et al., AND GERRY W. MONROE, et al. IN OPPOSITION

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January 1985

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether, in light of this Court's opinion in *TWA v. Thurston*, the "bona fide seniority system" defense under 29 U.S.C. §623(f)(2) is foreclosed as a matter of law.

2. Whether ALPA is barred from asserting that age-under-sixty is a bona fide occupational qualification for the position of flight engineer.

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In The

Supreme Court of the United States

October Term, 1984

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Cross-Petitioner,

v.

LEE F. HIGMAN, et al., GERRY W. MONROE, et al., EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and UNITED AIR LINES, INC.,

Respondents.

On Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENTS LEE F. HIGMAN, et al., AND GERRY W. MONROE, et al. IN OPPOSITION

Respondents Lee F. Higman, *et al.* and Gerry W. Monroe, *et al.* (the *Higman-Monroe* respondents) respectfully pray that the Conditional Cross-Petition of the Air Line Pilots Association, International (ALPA) be denied.

COUNTERSTATEMENT OF THE CASE

The *Higman-Monroe* respondents respectfully refer to the Statements of the Case presented in their Brief in

Opposition to United Air Lines, Inc.'s (United) Petition for Certiorari (No. 84-774) and in respondents' Conditional Cross-Petition (No. 84-916).[1]

REASONS THE WRIT SHOULD NOT BE GRANTED

1. ALPA's contention that United's actions were lawful under the "bona fide seniority system" exception to the Age Discrimination in Employment Act, 29 U.S.C. §623(f)(2), is foreclosed by the Court's recent decision in *TWA v. Thurston*, 53 U.S.L.W. 4024 (January 8, 1985). There the Court held that TWA's practice of refusing to allow Captains to "bump" to flight engineer positions at age sixty while allowing younger pilots to do so, was "discriminatory on its face." 53 U.S.L.W. at 4026. The Court also ruled that the bona fide seniority system defense was unavailable, noting that "any seniority system that includes the challenged practice is not 'bona fide' under the statute." 53 U.S.L.W. at 4027.

The Seventh Circuit's analysis tracks that of this Court in *Thurston*. Stating that the *Higman* respondents "are entitled to the same treatment as that accorded to younger first officers and captains who can no longer serve in those capacities," (A 20) the court held that respondents' evidence was "sufficient to support a finding that United administered the seniority system in a

[1] These briefs are cited herein as "R.Opp." and "R.Pet.," respectively. The Court of Appeals' opinion, reprinted in the appendix to United's Petition, is cited as "A ____."

discriminatory manner" (A 22). It found that, contrary to United's claim that downgrades were allowed in limited circumstances, it had permitted many pilots to downgrade, including some who would be unable to return to their former positions (A 20-22; *see* R.Opp. at 4-5). Based on these findings, the court held that judgment n.o.v. was properly denied (A 22).

The Court of Appeals did not review the district court's refusal to allow United to assert a claim under ADEA Section 4(f)(2), 29 U.S.C. §623(f)(2). That defense, however, is unavailable, since a seniority system may not "require or permit" the involuntary retirement of persons under seventy because of age. *Thurston*, 53 U.S.L.W. at 4027; *see* R.Opp. at 6-7. Thus, *Thurston* disposes of ALPA's and United's contentions regarding the seniority system, and requires the dismissal of both petitions.[2]

2. ALPA and United contended in the Court of Appeals that the jury should have been instructed in accordance with the bona fide occupational qualification test set forth in *Orzel v. City of Wauwatosa Fire Dept.*, 697 F.2d 743 (7th Cir.), *cert. denied*, 104 S.Ct. 484 (1983). The Court of Appeals agreed and remanded for retrial.[3] The *Orzel* standard, which follows the test first set forth in *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976), was opposed by ALPA and United in the district

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[2] Further, as a party to the *Thurston* litigation, ALPA is collaterally estopped from presenting the same legal arguments decided adversely to it in that action. *Montana v. United States*, 440 U.S. 147, 153 (1979). *See Stone v. Western Air Lines, Inc.*, 544 F.Supp. 33, 37-38 (C.D. Cal. 1982).

[3] The *Higman-Monroe* respondents have sought review of this aspect of the Court of Appeals' decision, in the event that United's petition is granted. *See* R.Pet. at 9-11.

court. There, defendants embraced the "rational basis to believe" test which ALPA now seeks to resurrect. ALPA may not renew a position before this Court which it abandoned in the Court of Appeals. *Cf. Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 330 (1967) (Supreme Court will not consider issues not presented to the Court of Appeals).[4]

Furthermore, ALPA should be estopped from contending that an age-sixty cutoff is necessary to safety. It did not seek review of the Second Circuit's contrary finding in *ALPA v. TWA*, which was consolidated with *Thurston*. *See* 713 F.2d at 949-51;[5] *see also* 53 U.S.L.W. at 4027 and n.18. This Court, moreover, rejected ALPA's position that a BFOQ may be established for the flight engineer by analogy to the FAA limitation on service by Captains. 53 U.S.L.W. at 4027; *see* 713 F.2d at 953-54.

In any event, the question of the proper standard for establishing a BFOQ for flight engineers is before this Court in *Western Air Lines, Inc. v. Criswell*, No. 83-1545

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[4] ALPA presents an out-of-context quote to suggest that the Seventh Circuit held that a BFOQ requires no more than a showing that an incapacitated flight engineer "would endanger the flight." ALPA Pet. at 20. The opinion clearly adopts the entire *Orzel-Tamiami* test (A 7-8) and directs the district court to apply it at retrial (A 11).

[5] On the same day that TWA announced that it would employ flight engineers over sixty, ALPA sued, seeking, *inter alia*, a declaratory judgment that age-less-than-sixty is a BFOQ for flight engineers. The district court granted summary judgment for TWA, and ALPA appealed. The Second Circuit held that it lacked jurisdiction over this claim, stating "We will not strain to expand our discretionary jurisdiction to issue a declaratory judgment in aid of this narrow BFOQ defense, particularly absent any showing of legitimate safety concerns." 713 F.2d at 951. ALPA did not petition this Court for review of its own case.

(oral argument held January 14, 1985). ALPA has participated in that action as *amicus curiae*, taking the same position urged in its Cross-Petition (*see* ALPA Pet. at 20-21 n.8). There thus is no need for the Court either to grant ALPA's Cross-Petition or to hold it in abeyance, since the decision in *Western* will be applied by the district court at the retrial of this action.

CONCLUSION

For the foregoing reasons, the *Higman-Monroe* respondents respectfully submit that ALPA's Conditional Cross-Petition be denied.

Respectfully submitted,

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